IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1409 OF 2005

Yellappa Durgappa Kamble .. Appellant.
(Orig.Plaintiff)

Versus

Lagmavva w/o. Rama Kamble & Anr. .. Respondents.
(Orig.Defendants)

Mr.Anil Subramaniam for appellant.
Mr.Dhundapa Patil & Meenakshi Patil for respondent No.4.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 19TH JULY, 2007.

P.C.:

1. The original plaintiff has challenged the judgement and decree of the lower Appellate Court confirming that of the Trial Court dismissing Regular Civil Suit No.14 of 1992.

2. The contention before me is that the Courts below failed to appreciate the true meaning and scope of the

right of pre-emption being founded in this case upon the plaintiff asserting his rights in an Ancestral property and when the original defendant No.4 acquired the rights under a Sale Deed of 27th August, 1982 along with the preferential right, the suit was within limitation. It could no have been dismissed as time barred.

3. It is next contended that the plaintiff could not have been called upon to establish and prove that the property is an ancestral property inasmuch as the relations of the appellant, who have been impleaded as defendants to the suit, do not dispute this aspect and in fact did not contest the suit.

4. For these reasons, the Second Appeal raises substantial question of law which need consideration by this Court.

5. The learned counsel appearing for the appellant contended that the grandmother of the plaintiff was Devdasi. She had two sons, namely, Lagma and Durgappa and the appellant plaintiff is the son of the deceased Durgappa. The other son Lagma had one son Yallavva and his sons are Bhima and Lagmvva, who are defendants to the suit but they chose not to appear and contest the same.

Respondent No.4 i.e. original defendant No.4 has acquired the property by virtue of a Sale Deed dated 27th August, 1982. The appellant plaintiff contends that he came to know about this transaction only in January, 1991.

6. It is pertinent to note that the appellant plaintiff firstly instituted a suit being Regular Civil Suit No.44 of 1991 against the respondent No.4 alleged stranger seeking injunction. Thereafter, he brought this substantive suit against the present respondents.

7. In my view, considering the plain averments, the Courts below were not in error in framing the issues and regarding one of the issue, with regard to the property being ancestral or not, casting the burden upon the appellant plaintiff to establish and prove the same. In this behalf, in paragraph 8 of its order, the lower Appellate Court has referred to the depositions on record and more particularly in paragraph 14 dealt with the plaintiff’s evidence. The plaintiff’s witness denied any knowledge of the name of the father of Yellavva and Durgappa and further denied knowledge of other heirs of deceased. He only said that he is a nephew of the plaintiff. As against this, the deposition on behalf of contesting defendants has been referred to and the Courts

below have rightly concluded that except the bare word of the appellant plaintiff that the property was standing in the name of Satyawwa, there is no evidence on record to establish that the property was an ancestral property.

8. This finding of the Courts below being concurrent and based upon the oral and documentary evidence, I see no reason to interfere with the same in my limited jurisdiction under Section 100 of the Code of Civil Procedure. In this jurisdiction, it is not possible to re-appreciate and re-appraise the evidence on record. I am disinclined to undertake such an exercise also because I am of the view that the findings recorded are neither perverse nor vitiated by any error otherwise.

9. The Courts below have also concurred in holding that the suit is barred by limitation. In this behalf, the Courts below have found that the suit has to be instituted within the time prescribed by law. The Courts below have held that the period of limitation being one year, the suit is barred by limitation. Once the evidence on record indicates that the appellant plaintiff failed to establish that the suit property is an ancestral joint property of the plaintiff and defendant No.3 his right to enforce his claim of pre-emption is on this basis, then,

neither Articles, namely, 97 and 113 would of assistance to the appellant plaintiff. Consequently, the suit had rightly been held to be barred by limitation.

10. Even this aspect is considered in the light of the materials produced, then, the finding on the issue of limitation does not give rise to any substantial question of law.

11. In these circumstances, the appeal fails and is summarily dismissed.

(S.C.Dharmadhikari, J.)